2006

State of Utah v. Nathaniel Thomas Yount : Brief of Appellee

Utah Court of Appeals

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Case No. 20060901-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Nathaniel Thomas Yount,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for driving under the influence of alcohol and/or a controlled substance, a third degree felony, in the Fifth Judicial District Court of Utah, Beaver County, the Honorable G. Michael Westfall presiding

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STATEMENT OF JURISDICTION

Defendant appeals from a conviction for driving under the influence of alcohol and/or a controlled substance, a third degree felony, in violation of Utah Code Ann. § 41-6a-502 (West 2004). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (2002).

STATEMENT OF THE ISSUES

Did the trial court err in denying defendant's motion to quash the subpoenas and suppress the evidence?

Standard of Review. Whether the prosecutor was required to give prior notice of the subpoenas, which were supported by probable cause and authorized by a

neutral judge, is a question of law reviewed for correctness. *See Burns v. Boyden*, 2006 UT 14, ¶ 6, 133 P.3d 370.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

§ 77-23-203. Conditions precedent to issuance

(1) A search warrant shall not issue except upon probable cause supported by oath or affirmation particularly describing the person or place to be searched and the person, property, or evidence to be seized.

(2) If the item sought to be seized is evidence of illegal conduct, and is in the possession of a person or entity for which there is insufficient probable cause shown to the magistrate to believe that such person or entity is a party to the alleged illegal conduct, no search warrant shall issue except upon a finding by the magistrate that the evidence sought to be seized cannot be obtained by subpoena, or that such evidence would be concealed, destroyed, damaged, or altered if sought by subpoena. If such a finding is made and a search warrant issued, the magistrate shall direct upon the warrant such conditions that reasonably afford protection of the following interests of the person or entity in possession of such evidence:

(a) protection against unreasonable interference with normal business;

(b) protection against the loss or disclosure of protected confidential sources of information; or

(c) protection against prior or direct restraints on constitutionally protected rights.[1]

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[1] In 2007, the Utah Legislature repealed section 77-23-203, effective April 30, 2007. Laws 2007, c. 153, § 7. Nearly identical provisions have since been adopted by rule in subsection (c) of rule 40 of the Utah Rules of Criminal Procedure. *See* Utah R. Crim. P. 40(c) (amendment effective April 30, 2007).

[CRIMINAL] RULE 14. SUBPOENA

(a) A subpoena to require the attendance of a witness or interpreter before a court, magistrate or grand jury in connection with a criminal investigation or prosecution may be issued by the magistrate with whom an information is filed, the prosecuting attorney on his or her own initiative or upon the direction of the grand jury, or the court in which an information or indictment is to be tried. The clerk of the court in which a case is pending shall issue in blank to the defendant, without charge, as many signed subpoenas as the defendant may require. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court.

(b) A subpoena may command the person to whom it is directed to appear and testify or to produce in court or to allow inspection of records, papers or other objects. The court may quash or modify the subpoena if compliance would be unreasonable.

(c) A subpoena may be served by any person over the age of 18 years who is not a party. Service shall be made by delivering a copy of the subpoena to the witness or interpreter personally and notifying the witness or interpreter of the contents. A peace officer shall serve any subpoena delivered for service in the peace officer's county.

(d) Written return of service of a subpoena shall be made promptly to the court and to the person requesting that the subpoena be served, stating the time and place of service and by whom service was made.

(e) A subpoena may compel the attendance of a witness from anywhere in the state.

(f) When a person required as a witness is in custody within the state, the court may order the officer having custody of the witness to bring the witness before the court.

(g) Failure to obey a subpoena without reasonable excuse may be deemed a contempt of the court responsible for its issuance.

(h) Whenever a material witness is about to leave the state, or is so ill or infirm as to afford reasonable grounds for believing that the witness will be unable to attend a trial or hearing, either party may, upon notice to the other, apply to the court for an order that the witness be examined conditionally by deposition. Attendance of the witness at the deposition may be compelled by subpoena. The defendant shall be present at the deposition and the court shall make whatever order is necessary to effect such attendance.

[CIVIL] RULE 45. SUBPOENA

* * *

(b) Service; scope.

(b)(1) *Generally.*

(b)(1)(A) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made as provided in Rule 4(d) for the service of process and, if the person's appearance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered. Prior notice of any commanded production or inspection of documents or tangible things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(b)(1)(B) Proof of service when necessary shall be made by filing with the clerk of the court from which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(b)(1)(C) Service of a subpoena outside of this state, for the taking of a deposition or production or inspection of documents or tangible things or inspection of premises outside this state, shall be made in accordance with the requirements of the jurisdiction in which such service is made.

(b)(2) *Subpoena for appearance at trial or hearing.* A subpoena commanding a witness to appear at a trial or at a hearing pending in this state may be served at any place within the state.

(b)(3) *Subpoena for taking deposition.*

(b)(3)(A) A person who resides in this state may be required to appear at deposition only in the county where the person resides, or is employed, or transacts business in person, or at such other place as the court may order. A person who does not reside in this state may be required to appear at deposition only in the county in this state where the person is served with a subpoena, or at such other place as the court may order.

(b)(3)(B) A subpoena commanding the appearance of a witness at a deposition may also command the person to whom it is directed to produce or to permit inspection and copying of documents or tangible things relating

to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 30(b) and paragraph (c) of this rule.

(b)(4) *Subpoena for production or inspection of documents or tangible things or inspection of premises.* A subpoena to command a person who is not a party to produce or to permit inspection and copying of documents or tangible things or to permit inspection of premises may be served at any time after commencement of the action. The scope and procedure shall comply with Rule 34, except that the person must be allowed at least 14 days to comply as stated in subparagraph (c)(2)(A) of this rule. The party serving the subpoena shall pay the reasonable cost of producing or copying the documents or tangible things. Upon the request of any other party and the payment of reasonable costs, the party serving the subpoena shall provide to the requesting party copies of all documents obtained in response to the subpoena.

* * *

RULE [OF EVIDENCE] 506. PHYSICIAN AND MENTAL HEALTH THERAPIST-PATIENT

(a) Definitions. As used in this rule:

(1) "Patient" means a person who consults or is examined or interviewed by a physician or mental health therapist.

(2) "Physician" means a person licensed, or reasonably believed by the patient to be licensed, to practice medicine in any state.

(3) "Mental health therapist" means a person who is or is reasonably believed by the patient to be licensed or certified in any state as a physician, psychologist, clinical or certified social worker, marriage and family therapist, advanced practice registered nurse designated as a registered psychiatric mental health nurse specialist, or professional counselor while that person is engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction.

(b) General Rule of Privilege. If the information is communicated in confidence and for the purpose of diagnosing or treating the patient, a patient has a privilege, during the patient's life, to refuse to disclose and to prevent any other person from disclosing (1) diagnoses made, treatment provided, or advice given, by a physician or mental health therapist, (2) information obtained by examination of the patient, and (3) information transmitted among a patient, a

physician or mental health therapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or mental health therapist, including guardians or members of the patient's family who are present to further the interest of the patient because they are reasonably necessary for the transmission of the communications, or participation in the diagnosis and treatment under the direction of the physician or mental health therapist.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, or the guardian or conservator of the patient. The person who was the physician or mental health therapist at the time of the communication is presumed to have authority during the life of the patient to claim the privilege on behalf of the patient.

(d) Exceptions. No privilege exists under this rule:

(1) *Condition as Element of Claim or Defense.* As to a communication relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which that condition is an element of any claim or defense, or, after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense;

(2) *Hospitalization for Mental Illness.* For communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the mental health therapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization;

(3) *Court Ordered Examination.* For communications made in the course of, and pertinent to the purpose of, a court-ordered examination of the physical, mental, or emotional condition of a patient, whether a party or witness, unless the court in ordering the examination specifies otherwise.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below.

The day after a one-car accident that seriously injured defendant (the driver) and one of his two passengers, the State charged defendant with two counts of attempted automobile homicide, driving under the influence of alcohol and/or a controlled substance, possession of a controlled substance, open container of alcohol in a vehicle, and failure to wear a seatbelt. R. 3-1, 7-4. The State also filed an Affidavit of Probable Cause in support of (1) a warrant for defendant's arrest, and (2) an order authorizing the issuance of subpoenas to obtain defendant's hospital records and any blood samples taken at Beaver Valley Hospital after the accident. R. 7-4. A district court judge signed an order authorizing the issuance of the subpoenas that same day. R. 18. The following day, the State issued subpoenas requiring the hospital "to surrender any blood samples taken from the Defendant . . . on approximately June 22, 2005, for delivery to the State Crime Lab for analysis, R. 15-14, and requiring the hospital "to provide for inspection and copying" emergency room and hospitalization records related to his treatment for the accident on June 22, 2005, R. 13-12. No notice was given to defendant of either the motion seeking the subpoenas or of the subpoenas themselves.

Following a preliminary hearing and entry of a partial bindover order, R. 64-63, the State filed an Amended Information charging defendant with (1) driving

under the influence of alcohol and/or a controlled substance, as a third degree felony, a class A misdemeanor, or a class B misdemeanor, (2) possession of marijuana, a class A misdemeanor, (3) open container in a vehicle, a class C misdemeanor, and (4) failure to wear a safety belt, an infraction. R. 77-75. Defendant waived a preliminary hearing on the amended charges. R. 74-73.

Defendant moved to suppress all the evidence obtained through the subpoenas. R. 86-80. Following a hearing on the matter, the trial court denied defendant's motion. R. 116-11. Pursuant to a plea agreement, defendant pled no contest to the third degree felony DUI charge and the State dismissed the remaining counts. R. 138-36, 150-39; R. 184: 18-19. Under the plea agreement, defendant reserved his right to appeal the district court's denial of his motion to suppress. R. 146, 143. The agreement provided that if defendant prevailed on appeal, he would be permitted to withdraw his plea and the case would be dismissed. R. 143. The trial court sentenced defendant to an indeterminate prison term of up to five years, suspended that sentence, and placed defendant on supervised probation for 36 months. R. 137, 151-54. Defendant timely appealed. R. 157-55.

B. Statement of Facts[2]

On June 22, 2005, defendant and two friends, Roger Thomas and Tim Medler, had been drinking beer and smoking marijuana. R. 6: ¶ 5. While driving his two friends up Beaver Canyon, defendant failed to negotiate a turn and the car plunged some 75 to 100 feet down a steep ravine in the canyon. R. 7-6: ¶¶ 2-3, 5. Defendant's arm and Thomas's leg were pinned underneath the car. R. 6-5: ¶¶ 3, 11. When Deputy Travys Stoddard arrived at the scene, he smelled a strong odor of alcohol coming from defendant. R. 6: ¶¶ 4, 6-7. He also saw open and closed beer cans in and around the vehicle, as well as pill bottles containing three different kinds of pills. R. 6: ¶¶ 4, 7. A forest service employee working at the scene of the accident found a small baggie of marijuana at the scene later that day. R. 4: ¶ 12.

Tim Medler told Deputy Stoddard that each of the men had drunk two or three beers. R. 6: ¶ 5. He also told the deputy that defendant was driving too fast when he drove around the corner. R. 6: ¶ 5. Emergency personnel who transported defendant and Thomas to the hospital smelled alcohol on both men. R. 6: ¶ 6. After the men were transported to the Beaver Valley Hospital, Deputy Glen Woolsey was dispatched to the hospital to obtain a blood draw from defendant for an alcohol and drug test, but defendant refused. R. 5: ¶¶ 8-10.

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[2] The facts are taken from the Affidavit of Probable Cause. *See* R. 7-4. Citations to the affidavit include the paragraph number from which the fact is taken.

SUMMARY OF ARGUMENTS

The trial court ruled that rule 45, Utah Rules of Civil Procedure, required the State to give notice to defendant of the subpoenas served on the hospital, but refused to suppress the evidence under an inevitable discovery rationale. This Court should affirm the trial court's ruling on alternative grounds.

The State was not required to give defendant notice of the subpoenas. Subpoenas issued under rule 14 of the Utah Rules of Criminal Procedure and rule 45 under the Utah Rules of Civil Procedure address the procedure for subpoenas that do not require prior judicial approval before issuance or service. Under *State v. Gonzales*, 2005 UT 72, 125 P.3d 878, such subpoenas require the issuer to first serve notice on the opposing party. The subpoenas in this case, however, are different in nature. The prosecutor did not issue the subpoenas on his own initiative without judicial oversight, as contemplated under rule 14. Instead, he obtained an order authorizing issuance of the subpoenas after making a showing of probable cause. The affidavit of probable cause was sufficient to support a search warrant. However, the court-authorized subpoena comported with the requirements of Utah Code Ann. § 77-23-203 (West 2004), which requires the State to obtain evidence of illegal conduct through use of a subpoena, rather than a search warrant, where an innocent third party is in possession of the evidence. Just as notice is not required

for a search warrant, it should not be required for a section 77-23-203 subpoena that is judicially authorized upon a showing of probable cause.

The State was also not required to first submit the hospital records to the trial court for *in camera* inspection. Under applicable case law, *in camera* review is a mechanism to ensure a defendant's federal due process right to privileged, exculpatory information that is favorable to his defense. No such interests were implicated here. Moreover, neither civil rule 45, criminal rule 14, nor rule 506 of the Utah Rules of Evidence require such a review.

Even assuming, arguendo, the State was required to give notice and submit the records to the court for *in camera* review, suppression was not warranted. Where the records were not privileged under rule 506(d)(1) of the Utah Rules of Evidence, and where the prosecutor obtained prior judicial authorization for the subpoena, complied with HIPAA, and sought to follow the requirements of section 77-23-203, suppression of all the evidence would be disproportionate to the error and would have little, if any, deterrent value.

ARGUMENT

Defendant argues that the trial court erred in denying his motion to quash the subpoenas and to suppress the evidence obtained therefrom. He claims that reversal is required because (1) the State did not provide him with notice of the subpoenas before they were issued, and (2) the State did not submit the hospital records to the trial court for *in camera* review. Aplt. Brf. at 6-11. Both claims fail.

A. Prior notice to defendant is not required for a subpoena that is issued in lieu of a search warrant pursuant to an order of the trial court after a finding of probable cause.

Citing *State v. Gonzales*, 2005 UT 72, 125 P.3d 878, defendant argues that under rule 45(b)(1)(A) of the Utah Rules of Civil Procedure, the prosecution must give prior notice to defendant of any subpoena served on a third party. Aplt. Brf. at 6-7. Defendant argues that because he did not receive prior notice of the prosecution's subpoenas to the hospital, "the trial court should have quashed the subpoena and forbade the prosecution [from] utiliz[ing] the information learned . . . through review of the records." Aplt. Brf. at 7. The trial court agreed that civil rule 45 required the State to give defendant prior notice of the subpoenas, but ruled that suppression was not warranted under the inevitable discovery doctrine. R. 116-11. This Court should affirm the trial court's ruling, but on an alternative ground. *See Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158 (recognizing that "an appellate court may affirm the judgment appealed from 'if it is sustainable on any legal ground or

theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action'")(citations omitted).

1. *State v. Gonzales* is inapposite.

Defendant's reliance on *Gonzales* is misplaced. In that case, Gonzales was charged with attempted rape and forcible sexual abuse of his fiancée's 16-year-old daughter. 2005 UT 72, ¶ 10. In preparation for trial, defense counsel served a subpoena for the daughter's mental health records on the University of Utah Neuropsychiatric Institute (UNI), but did not give notice of the subpoena to the State. *Id.* at ¶¶ 12, 25. Initially, UNI refused to comply with the subpoena, responding in a letter that the records were privileged under rule 506, Utah Rules of Evidence. *Id.* Defense counsel thereafter submitted to UNI an affidavit representing that the daughter's mental condition was an element of a claim or defense in the case and that the records therefore fell within an exception to the privilege. *Id.*; *see* Utah R. Evid. 506(d). Satisfied with this response, UNI sent the records directly to defense counsel. *Gonzales*, 2005 UT 72, ¶ 12. When the State learned that UNI had provided the records directly to the defense, it moved to quash the subpoena and suppress use of the records at trial. *Id.* at ¶ 14. The trial court granted the State's motion, in part because defense counsel did not give prior notice of the subpoena to the prosecutor, as required under rule 45 of the Utah Rules of Civil Procedure. *Id.* at ¶¶ 14-18, 25 & n.1.

On appeal, Gonzales argued that the procedure for issuing subpoenas in criminal cases is not governed by civil rule 45, but exclusively by rule 14 of the Utah Rules of Criminal Procedure. *Id.* at ¶¶ 26-28. That rule provides in relevant part as follows:

> **(a)** A subpoena to require the attendance of a witness or interpreter before a court, magistrate or grand jury in connection with a criminal investigation or prosecution may be issued by the magistrate with whom an information is filed, the prosecuting attorney on his or her own initiative or upon the direction of the grand jury, or the court in which an information or indictment is to be tried. The clerk of the court in which a case is pending shall issue in blank to the defendant, without charge, as many signed subpoenas as the defendant may require. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court.
>
> **(b)** A subpoena may command the person to whom it is directed to appear and testify or to produce in court or to allow inspection of records, papers or other objects. The court may quash or modify the subpoena if compliance would be unreasonable.
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> * * *

Utah R. Crim. P. 14(a)-(b).[3] Gonzales contended that because rule 14 does not include a notice requirement, he had no duty to notify the prosecutor. *Gonzales*, 2005 UT 72, ¶ 26. The Court rejected Gonzales's argument. It held that where subsection (b) expressly authorizes trial courts to quash or modify unreasonable

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[3] Rule 14 also indicates how and by whom a subpoena may be served, requires a written return of service, makes failure to obey a contemptible offense, and allows conditional depositions for witnesses who may be unable to attend trial. Utah R. Crim. P. 14(c), (d), (f), (g), & (h).

subpoenas, the rule "clearly signals that some notice to adverse parties of the issuance of a subpoena is contemplated." *Id.* at ¶ 31. The Court reasoned that if no notice was required, "no application for an order to quash or modify could be made by an adversely affected party." *Id.* Because rule 14 does not specify the notice requirements, the Court held that under rule 81, Utah Rules of Civil Procedure, the notice requirements of civil rule 45 apply. *Id.* at ¶¶ 27-41.[4]

Gonzales is inapposite because the subpoena issued there was different in kind than the subpoena issued here. The subpoena in *Gonzales* was not issued pursuant to a court order based on a finding of probable cause, as was the case here. Although the *Gonzales* decision does not expressly identify who issued the subpoena, as a defense-generated subpoena, it was presumably issued by the court clerk pursuant to rule 14(a) of the Utah Rules of Criminal Procedure. Utah R. Crim. P. 14(a). Clerk-issued subpoenas do not require prior judicial authorization. *See* Utah R. Crim. P. 14(a) ("The clerk of the court in which a case is pending shall issue in blank to the defendant, without charge, as many signed subpoenas as the defendant may require."). Nor do subpoenas issued by the prosecutor under rule

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[4] Rule 81 provides that the rules of civil procedure "shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement." Utah R. Civ. P. 81(e).

14. *See* Utah R. Crim. P. 14(a) ("A subpoena ...may be issued by ... the prosecuting attorney on his or her own initiative or upon the direction of the grand jury ....").

Rule 14 also recognizes that subpoenas "may be issued by the magistrate with whom an information is filed." Utah R. Crim. P. 14(a). However, as with the clerk- and prosecutor-issued subpoenas, the rule does not contemplate that such subpoenas be first subjected to judicial approval before issuance. The same holds true for subpoenas issued under rule 45 of the Utah Rules of Civil Procedure. *See* Utah R. Civ. P. 45(a)(3) ("The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court.").

In sum, rule 14 subpoenas are not subject to judicial oversight until *after* they are issued. *Gonzales* addressed the requirements of clerk-issued subpoenas, and its notice requirement *may* very well extend to other rule 14 subpoenas that do not require prior judicial authorization.[5] *Gonzales* teaches that in such cases, civil rule 45(b)(1)(a)'s notice requirement is applicable, thereby affording the trial court an

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[5] Whether the *Gonzales* notice requirement extends to other rule 14 subpoenas is not before this Court. For purposes of this argument, however, the State will assume that the *Gonzales* notice requirement applies to all rule 14 subpoenas.

opportunity to address the validity of the subpoena should the opposing party choose to challenge it after it is issued, but before compliance.

2. Like warrants, subpoenas issued in lieu of search warrants under section 77-23-203 do not require prior notice.

The subpoena issued in this case was different in kind. When the State filed the Information, it also submitted, under oath, an Affidavit of Probable Cause in support of not only a warrant for defendant's arrest, but also in support of an order "authorizing the issuance of a subpoena to acquire the hospital records ... and any blood that was drawn pursuant to the accident on June 21, 2005." R. 7-4. Based on the affidavit's probable cause showing, the trial court issued both an arrest warrant and an order authorizing the issuance of the subpoenas. *See* R. 10-9, 18. Thus, unlike rule 14 subpoenas, the subpoenas in this case had already been subjected to judicial oversight.

The subpoenas here operated as a sort of substitute for a search warrant. They were issued upon a probable cause showing under oath and were expressly limited to the records and blood samples generated by Beaver Valley Hospital in connection with the June 22, 2005 accident. As a general rule, evidence of illegal conduct is "seized pursuant to a search warrant." Utah Code Ann. § 77-23-202(3) (West 2004). But if the evidence of illegal conduct "is in the possession of a person or entity for which there is insufficient probable cause shown to the magistrate to believe that such person or entity is a party to the alleged illegal conduct," Utah law

provides that the State may not secure a search warrant "except upon a finding that the evidence sought to be seized cannot be obtained by subpoena . . . Utah Code Ann. § 77-23-203(2) (West 2004). In other words, where an innocent third party is in possession of evidence of illegal conduct, the State must obtain the evidence by subpoena, where possible. [6]

Section 77-23-203 does not identify the procedures for obtaining such a subpoena. But because subpoenas contemplated under section 77-23-203 are in lieu of the traditional search warrant, the statute implicitly contemplates prior judicial authorization upon an appropriate showing of probable cause under oath, as required for a search warrant. As discussed above, criminal rule 14 and civil rule 45 require no such showing. And where a search warrant may be issued without prior notice to the defendant, section 203 subpoenas cannot reasonably be interpreted as requiring prior notice. The opportunity to challenge the subpoena comes as it does with a search warrant, pursuant to a motion to suppress.

The requirement of serving subpoenas on innocent third parties, in lieu of warrants, is supported by sound public policy. Innocent third parties should not be

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[6] The Fourth Amendment includes no such restriction. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 554 (1978) (holding that "valid warrants may be issued to search *any* property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found).

subjected to searches—even where there is probable cause that they are in possession of evidence—if the evidence can be obtained by subpoena. Accordingly, the purpose of section 77-23-203 is to avoid unnecessary inconvenience and disruption to innocent third parties, not provide defendants with notice that they would not otherwise receive.

Defendant suggests that the federal Health Insurance Portability and Accountability Act (HIPAA), 45 C.F.R. §§ 164.500-164.534 (2007), also requires notice for the subpoenas issued in this case. Aplt. Brf. at 7 n.2. It does not. To the contrary, HIPAA recognizes that a hospital "may disclose protected health information in the course of any judicial ... proceeding ... [i]n response to *an order of a court* ...." 45 C.F.R. 164.512(e)(1)(i) (emphasis added). The rule does not require notice under these circumstances. In contrast, notice is required (unless a protective order is sought) if records are disclosed "[i]n response to *a subpoena ... that is not accompanied by an order of a court.*" 45 C.F.R. § 164.512(e)(1)(ii)(A) (emphasis added) (permitting disclosure "if ... [the hospital] receives satisfactory assurance ... that the individual who is the subject of the protected health information that has been requested has been given notice of the request"). Having received an order for issuance of the subpoena, the State did not violate HIPAA.

B. *State v. Gonzales* does not require that evidence subpoenaed by the prosecution be first submitted to the trial court for *in camera* review.

Defendant also contends that "when confidential [medical] records are obtained by subpoena, the subpoenaing party must turn the records over to the trial court for *in camera* inspection" to determine whether access to the records is precluded under the physician-patient privilege of rule 506, Utah Rules of Evidence. Aplt. Brf. at 7. He claims that because the prosecution in this case did not first seek such *in camera* review, "the trial court should have quashed the subpoena and forbade the prosecution [from] utliz[ing] the information learned . . . through review of the records." Aplt. Brf. at 7. This claim also fails.

In support of his *in camera* review claim, defendant again turns to *Gonzales*. Once again, however, *Gonzales* does not support defendant's claim. As noted, the Supreme Court in *Gonzales* affirmed the trial court's order quashing the subpoena because Gonzales did not give notice. *See Gonzales*, 2005 UT 72, ¶ 41. It also affirmed the order because Gonzales's ability as a defendant to obtain the victim's mental health records "depended on approval of the trial court following an *in camera* review," a process he did not follow. *Id.* at ¶ 43. Relying on *State v. Cardall*, 1999 UT 51, 982 P.2d 79, and *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the Utah Supreme Court held that Gonzales's "authority to examine [the mental health] records, however obtained, depended on approval of the trial court following an *in camera* review." *Gonzales*, 2005 UT 72, ¶ 44. These cases, however, do not impose a

general requirement for *in camera* review whenever a party seeks records that may be privileged. Rather, *in camera* review is a judicially-created mechanism to ensure a *defendant's* federal due process right to *exculpatory information* that might be privileged—a right not implicated here.

In *Ritchie*, the defendant, charged with raping his 13-year-old daughter, attempted to subpoena privileged records from the state agency responsible for investigating child abuse allegations. *Ritchie*, 480 U.S. at 43. Ritchie argued that a review of the records would reveal the weaknesses in his daughter's testimony and that access to the records was thus necessary to enable him to effectively question his daughter at trial. *Id.* at 49. On certiorari, the U.S. Supreme Court recognized that a defendant has a due process right to receive evidence in the government's possession "that is both favorable to the accused and material to guilt or punishment." *Id.* at 57. The Court held that because Pennsylvania recognized exceptions to the privilege, Ritchie had a due process right to have the agency file "reviewed [*in camera*] by the trial court to determine whether it contain[ed] information that probably would have changed the outcome of his trial." *Id.* at 58, 60. The Court explained that "*in camera* review by the trial court will serve Ritchie's [due process] interest without destroying [Pennsylvania's] need to protect the confidentiality" interests protected by the privilege. *Id.* at 60.

In *Cardall*, the defendant was charged with raping his girlfriend's 11-year-old daughter. *Cardall*, 1999 UT 51, ¶ 10. Prior to trial, Cardall filed a motion asking the court to conduct an *in camera* review of the daughter's school psychological records, but the trial court denied the motion on the basis of privilege. *Id.* Applying *Ritchie*, the Utah Supreme Court reversed and remanded the case for an *in camera* review by the trial court. *Id.* at ¶¶ 27-35. The Court explained that "if a defendant can show with reasonable certainty that exculpatory evidence exists which would be favorable to his defense, *Ritchie* gives him the right to have the otherwise confidential records reviewed by the trial court to determine if they contain material evidence." *Id.* at ¶ 30. After reviewing the record, the Court concluded that "Cardall [was] entitled to an in camera review by the trial court to determine whether the records contain[ed] information which might be material to his defense." *Id.* at ¶ 34.

In sum, *in camera* review is a mechanism to ensure a defendant's federal due process right to privileged, exculpatory information that is favorable to his defense. As later explained in *State v. Blake*, a defendant is entitled to *in camera* review of privileged records only if he can "show, with reasonable certainty, that the sought-after records actually contain 'exculpatory evidence . . . which would be favorable to his defense.'" 2002 UT 113, ¶ 19, 63 P.3d 56 (quoting *Cardall*, 1999 UT 51 , ¶ 30). If a defendant satisfies this test, the trial court must "then conduct an *in camera* review

for materiality." *Id.* at ¶ 23. If the privileged record contains favorable information that is material to the defense, defendant will be entitled to the information. *See id.*

In this case, the State's subpoenas for the blood sample and hospital records did not implicate defendant's due process right to exculpatory information. Accordingly, *in camera* review is not mandated under *Ritchie*, *Cardall*, *Blake*, or *Gonzales*. Defendant has not pointed to any other authority requiring *in camera* review under these circumstances. Neither rule 14 of the Utah Rules of Criminal Procedure, nor rule 45 of the Utah Rules of Civil Procedure, requires *in camera* review of subpoenaed documents. *See* Utah R. Crim. P. 14; Utah R. Civ. P. 45. Moreover, rule 506 of the Utah Rules of Evidence, which establishes the patient-physician privilege, also does not contemplate or require *in camera* review. Defendant's claim thus fails.

C. Assuming, arguendo, the State should have notified defendant of the subpoenas and submitted the records to the trial court for *in camera* review, suppression is not warranted in light of the mitigating circumstances of this case.

Even assuming, arguendo, the State was required to give notice of the subpoenas and was not entitled to review the records until an *in camera* inspection by the trial court, suppression of the evidence was still not warranted.

Although the trial court below concluded that civil rule 45 required the State to give defendant prior notice of the subpoena, it denied defendant's motion to quash and suppress "[t]o the extent that the Subpoena sought and obtained

evidence relevant to the Defendant's physical condition at the time of the accident." R. 111. The court also ordered that "[a]ny information contained in the produced documents that is not relevant to the Defendant's physical condition at the time of the accident [be] returned to the Defendant and references to such information [be] redacted from those documents which the Prosecutor intends to use as evidence at trial." R. 111. Relying on *Gonzales*, defendant argues that the court was required to suppress all the information. His argument fails.

Although *Gonzales* affirmed the trial court's order quashing the subpoena for defendant's use of a flawed subpoena process, criminal rule 14(b) does not require quashal or suppression. As observed in *Gonzales*, "criminal rule 14(b) states that the court *may* quash *or modify* a subpoena if compliance is 'unreasonable.'" *Gonzales*, 2005 UT 72, ¶ 30 (quoting Utah R. Crim. P. 14(b)) (emphases added). In other words, suppression is discretionary with the trial court. In denying the motion to suppress, the trial court relied on an "inevitable discovery" rationale. R. 112. However, a review of the factors upon which the court relied in denying the motion to suppress demonstrates that the court did not abuse its discretion under rule 14.

Several factors mitigated against suppression. First, the State would have received the records even if it had given defendant advance notice of the subpoenas. Second, the trial court effectively modified the subpoenas by ordering that any documents obtained that were not relevant to defendant's physical condition at the

time of the accident be returned and redacted from the record. Third, the prosecutor did not simply issue the subpoenas on his own initiative, but obtained prior judicial authorization for their issuance based on a showing of probable cause. And fourth, HIPAA does not require notice.

1. Even had notice been given, the State would have obtained the records because they were not privileged under rule 506(d)(1) of the Utah Rules of Evidence.

As noted by the trial court, even had the prosecutor provided advance notice to defendant, the State "would have been able to obtain the Defendant's medical records, or at least the records relating to the test of his blood for alcohol or controlled substances, as relevant evidence of the Defendant's physical condition at the time of the accident despite any claimed privilege, pursuant to Rule 506(d)(1) of the Utah Rules of Evidence." R. 112.

Rule 506(d)(1) states that no physician-patient privilege exists "[a]s to a communication relevant to an issue of the physical ... condition of the patient in any proceeding in which that condition is an element of any claim or defense." Utah R. Evid. 506(d)(1). In this case, defendant's physical condition, i.e., his impairment from alcohol consumption or drug use, was an element of driving while under the influence of alcohol or drugs under Utah Code Ann. § 41-6a-502 (West Supp. 2005). The trial court thus correctly ruled that any communications related to the

assessment or treatment of that condition were not privileged under evidence rule 506(d)(1). Thus, even with notice, the State would have received the records.

As observed by the trial court, "[t]he only harm [suffered by defendant] in this instance is that the Prosecutor did not provide Defendant notice before the Prosecutor obtained the Subpoena which," in any event, "[the Prosecutor] could and would have obtained even if notice had been given." R. 112. In other words, any error was harmless. *See* R. 111. This case is thus unlike *Gonzales*, which required suppression. In *Gonzales*, the defense was "simply 'I didn't do it'" and Gonzales wished to use the victim's mental health records to impeach her credibility as a witness. *Gonzales*, 2005 UT 72, ¶ 43. The Supreme Court observed that although impeachment of the victim was "part of [the] defense strategy," it was "not actually an element of his defense." *Id.* Therefore, the records in *Gonzales* were privileged and prior notice would have prevented their disclosure in the first instance. As discussed above, notice would not have blocked disclosure in this case.

2. The trial court effectively "modified" the subpoena by suppressing any information obtained that was not relevant to defendant's physical condition at the time of the accident.

The trial court denied defendant's motion to suppress and quash "[t]o the extent the Subpoena sought and obtained evidence relevant to Defendant's physical condition at the time of the accident." R. 111. However, the court also ordered that "[a]ny information contained in the produced documents that is not relevant to the

Defendant's physical condition at the time of the accident [be] returned to the Defendant and references to such information [be] redacted from those documents which the Prosecutor intends to use as evidence at trial." R. 111. This order was, in effect, a modification of the subpoena as permitted under rule 14(b). *See* Utah R. Crim. P. 14(b) (providing that "[t]he court may ... modify the subpoena if compliance is unreasonable"). Moreover, it had the same effect had the documents been secured by a search warrant.

3. Unlike defendant in *Gonzales*, the prosecutor here did not simply issue the subpoenas on his own initiative, but first obtained judicial authorization for their issuance.

Like the defendant in *Gonzales*, the prosecutor here did not give advance notice of the subpoena to the opposing party. But unlike the defendant in *Gonzales*, the prosecutor in this case obtained a court order for issuance of the subpoena based on a showing of probable cause. This distinction is significant. As discussed, the trial court finding of probable cause was tantamount to a judicial finding that the records sought were not privileged under rule 506. They were "relevant to an issue of the physical ... condition of [defendant] in [a criminal] proceeding in which that condition [was] an element" of the State's claim that defendant was driving while under the influence of alcohol or drugs. Utah R. Evid. 506(d)(1).

According to the Affidavit of Probable Cause, defendant was the driver of a vehicle that plunged some 75 to 100 feet down a ravine in Beaver Canyon, partially

pinning defendant and one of his two passengers under the car. R. 7-6. The uninjured passenger told the responding officer that defendant was driving too fast when he attempted to negotiate a curve. R. 6. He also told the officer that each of the three men had consumed two or three beers. R. 6. The officer smelled a strong odor of alcohol coming from defendant's person. R. 6. Emergency medical technicians (EMTs) likewise smelled alcohol on defendant and his injured passenger. R. 6. The officer observed open and closed containers of beer in and around the vehicle. R. 6. He found a 30-pack beer carton in the back of the vehicle and 16 beer cans, three opened and 13 closed. R. 6. The remaining 14 beer cans were unaccounted for. *See* R. 6.

The affidavit also revealed that the responding officer found three pill bottles, containing different kinds of pills, lying on the ground at the accident scene. R. 6. A forest service employee, who also responded to the accident, found a small baggie of marijuana at the scene. R. 4. Finally, the affidavit indicated that defendant refused to submit to a blood test, even though he was currently on probation and was required, under the terms of his probation, to consent to blood tests. R. 5.

The affidavit thus provided "a 'substantial basis'" for the trial court's probable cause determination that defendant was driving while under the influence of alcohol or drugs, in violation of Utah Code Ann. § 41-6a-502 (West 2004). *See*

State v. Thurman, 846 P.2d 1256, 1260 (Utah 1993) (citation omitted).[7] This, in turn, established that defendant's physical condition was an element of the offense. Accordingly, the trial court correctly ruled that communications at the hospital related to that condition are not privileged under the rule.[8]

Citing *Gonzales*, defendant contends that he had a due process right to notice of the subpoena and a hearing thereon *prior* to its issuance. Aplt. Brf. at 6-7. This claim is unavailing. Although the probable cause determination did not provide defendant with the kind of hearing to which he would otherwise be entitled when claiming a privilege, it provided the same safeguards defendant would have received had the State obtained the records pursuant to a search warrant. And, as would have been the case had the State secured the evidence via a search warrant, defendant was thereafter afforded the full opportunity to claim the privilege in a motion to suppress, complete with a hearing. The pre-seizure judicial authorization, together with the subsequent opportunity to claim the privilege, was sufficient to satisfy the demands of due process. *Cf. In re McCorkle*, 972 F.Supp. 1423, 1436 (M.D.

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[7] Defendant has not contended otherwise. *See* Aplt. Brf. at 6-11.

[8] For purposes of this case, the State does not dispute defendant's contention that a reasonable expectation of privacy exists in one's medical records under both the Fourth Amendment to the United States Constitution and Article I, section 14 of the Utah Constitution. *See* Aplt. Brf. at 6. However, the law is well settled that such expectation of privacy may yield to the government's interest in prosecuting crime upon a showing of probable cause and judicial authorization.

Fla. 1997) (holding in that "initial seizure [of property], based on affidavit submitted to a neutral magistrate, comported with the requirements of due process").

4. Issuance of the court-authorized subpoenas complied with the requirements of HIPAA.

Finally, as discussed, *supra*, at 19, and as observed by the trial court below, R. 112, the State complied with the requirements of HIPAA. Had the State not obtained an order authorizing the subpoena, it would have been required to give notice of the subpoena or sought a qualified protective order. *See* 45 C.F.R. § 164.512(e)(1)(ii). Instead, the State obtained an order authorizing the subpoena and notice therefore was not required. *See* 45 C.F.R. § 164.512(e)(1)(ii)(A).

* * *

In light of the foregoing factors, it cannot be said that the trial court abused its discretion in denying defendant's motion to suppress the hospital records and blood sample. Defendant contends that suppression is required under the Fourth Amendment and article I, section 14, of the Utah Constitution. Aplt. Brf. at 7-8. But as noted by the trial court, R. 112, the "core rationale" for applying the exclusionary rule "has been that this admittedly drastic and socially costly course is needed to deter police violations of constitutional and statutory protections." *Nix v. Williams*, 467 U.S. 431, 442 (1984). Where the records were not privileged under rule 506(d)(1) of the Utah Rules of Evidence, and where the prosecutor obtained prior judicial authorization for the subpoena, complied with HIPAA, and sought to follow the

requirements of section 77-23-203, suppression of all the evidence would have little, if any, deterrent value and would be disproportionate to the error.[9]

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's convictions.

ORAL ARGUMENT

The State requests oral argument. "[O]ral argument is a tool for assisting the appellate court in its decision making process," *Perez-Llamas v. Utah Court of Appeals*, 2005 UT 18, ¶ 10, 110 P.3d 706, and "the only opportunity for a dialogue between the litigant and the bench." *Moles v. Regents of Univ. of Cal.*, 654 P.2d 740, 743 (Cal.

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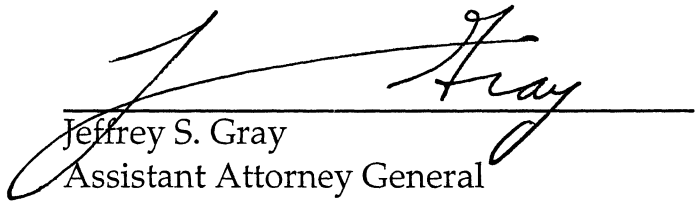
[9] The State maintains that, in any case, suppression is not required under the Utah Constitution. The State recognizes that in *State v. Thompson*, the Utah Supreme Court held that "'[e]xclusion of illegally obtained evidence is a necessary consequence of police violations of article I, section 14.'" 810 P.2d 415, 419 (Utah 1991) (quoting *State v. Larocco*, 794 P.2d 460, 472 (Utah 1990)). However, as observed in *American Bush v. City of South Salt Lake*, "in interpreting the Utah Constitution, . . . [Utah courts] analyze its text, historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting." 2006 UT 40, ¶ 12, 140 P.3d 1235. The text does not provide for exclusion of evidence for violations of article I, section 14. *See* Utah Const. art. I, § 14. Moreover, the State has found nothing in the historical evidence of the state of the law or in the State's traditions suggesting that exclusion of the evidence was required for a violation of article I, section 14, of the Utah Constitution. Accordingly, suppression of the evidence is not a proper remedy.

1982). In the case at bar, the decisional process would "be significantly aided by oral argument." Utah R. App. P. 29(a)(3).

Respectfully submitted August 29, 2007.

Mark L. Shurtleff
Utah Attorney General

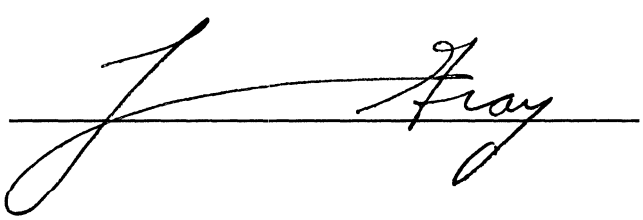


Jeffrey S. Gray
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2007, I served two copies of the foregoing Brief of Appellee upon the defendant/appellant, Nathaniel Thomas Yount, by causing them to be delivered by first class mail to his counsel of record as follows:

Edward K. Brass
175 East 400 South, Ste. 400
Salt Lake City, UT 84111



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ADDENDUM A

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BY

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF BEAVER, STATE OF UTAH

THE STATE OF UTAH, **Plaintiff** **vs.** **NATHANIEL THOMAS YOUNT** **Defendant**	**FINDINGS AND ORDER DENYING MOTION TO SUPPRESS AND QUASH SUBPOENA FOR MEDICAL RECORDS** **Case No. 051500105** **JUDGE: G. MICHAEL WESTFALL**

On or about December 5, 2005 the Defendant filed a Motion to Suppress and Quash Subpoena for Medical Records, together with a Memorandum supporting that Motion. On January 11, 2005, the State of Utah filed a Memorandum in Opposition of [sic] Defendant's Motion to Suppress and Squash [sic] Subpoena for Medical Records. The matter having been submitted to the Court for decision, the Court hereby makes and enters the following:

FINDINGS OF FACT

1. On June the 22nd 2005 there was a rollover accident wherein a car failed to make a sharp narrow turn with low visibility, went down a ravine, and came to rest against some trees. Deputy Travys Stoddard of the Beaver County Sheriff's Office arrived and found the Defendant and Roger Thomas pinned underneath the car. The Defendant

smelled of alcohol and there were open and full beer containers as well as three different kinds of pills and some marijuana in and around the car.

2. Tim Medlar, who was also in the car, told Deputy Stoddard that the occupants had had two or three beers, and that the Defendant was driving and speeding at the approximate rate of 48 mph when they went around a curve before the accident.

3. At the hospital, well before he was arrested, the Defendant refused a blood draw requested by Deputy Glenn Woolsey, despite having received the standard admonitions and also a warning that his probation would be revoked if he did not consent.

4. The same day the Defendant was arrested and charged with several serious offenses, on June 23, 2005, the Beaver County Attorney's office had filed formal charges against the Defendant in the form of an Information and submitted an Affidavit of Probable Cause, alleging the foregoing facts, seeking a court order to subpoena the Defendant's medical records as well as a warrant for his arrest.

5. An Order Authorizing the Issuance of a Subpoena and Subpoena Duces Tecum was issued by the court on June 23, 2005. A Subpoena Duces Tecum was issued by the court clerk on that same day as well.

6. The Defendant was not notified of the request for a subpoena duces tecum nor was the Defendant notified that the Subpoena had been issued or served prior to the production of the documents sought pursuant to the Subpoena.

7. The Beaver Valley Hospital produced the Defendant's medical records, which revealed a great deal of highly personal information about the Defendant, including the results of a test of his blood.

8. The Defendant's medical records were not provided to the trial court for an *in camera* review prior to their having been inspected by the Prosecutor's office.

MEMORANDUM DECISION.

There are several procedures available whereby the State may obtain discovery in a criminal case. Pursuant to Utah Code Annotated § 77-22-1 et seq. a prosecutor may obtain a subpoena in order to conduct a criminal investigation prior to the filing a formal charges. However, as the Utah Supreme Court ruled in Gutierrez v. Medley, 972 P.2d 913, (Utah 1998), "[T]he subpoena powers act can be used by the state only prior to the filing of formal criminal charges." Id. at 917. In this case, the Information was filed, that is formal criminal charges had been filed, on June 23, 2005 at 1:36 p.m., at the same time as the Affidavit of Probable Cause was filed. The affidavit of probable cause requests the issuance of a warrant for the arrest of the Defendant and requests an order authorizing the issuance of a subpoena to acquire the Defendant's hospital records and specifically hospital records regarding "any blood that was drawn pursuant to the accident [that occurred] on June 21, 2005 [sic]." It is apparent to this court that the subpoena was requested after formal criminal charges were filed and, therefore, was not requested pursuant to the Subpoena Powers Act. The procedures for obtaining a subpoena pursuant to that act, therefore, do not apply to this matter.

U. C. A. § 77-23-203(2) allows the Prosecutor to obtain evidence of illegal conduct from a third-party by search warrant, provided the evidence sought to be seized cannot be obtained by subpoena or that such evidence would be concealed, destroyed, damaged, or altered if sought by subpoena. This quite clearly suggests that the Prosecutor may obtain

evidence from a third party by subpoena. Unfortunately, the statute does not provide any guidance with regard to the procedure for obtaining or serving the subpoena.

In this case, the prosecutor sought an order authorizing the issuance of a subpoena based on an Affidavit of Probable Cause. Although that Affidavit does establish sufficient probable cause to believe that the evidence sought from the third party, in this case the Beaver County Hospital, is "evidence of illegal conduct," this court is aware of no statute or rule, and State has cited to none, which authorizes the Prosecutor to obtain and serve a subpoena after "formal criminal charges" have been filed without notice to the Defendant, even if supported by probable cause.

If there is no procedure identified by the legislature for the obtaining of a post filing subpoena in a criminal case, the rules for obtaining a subpoena in a civil case would apply, pursuant to Rule 81(e) of the Utah Rules of Civil Procedure.

Rule 45(b) (1) (A) of the Utah Rules of Civil Procedure requires that "prior notice of any commanded production . . . of documents . . . shall be served on each party in the manner prescribed by Rule 5(b)." This court is aware of no law or rule, and the State has cited to none, which would authorize a party to subpoena documents from a nonparty after the lawsuit has been commenced without such prior notice, whether the matter at issue be a civil proceeding or a formally charged criminal matter.

Since the Prosecutor did not provide the Defendant with prior notice of the commanded production of documents, the obtaining of those documents constitutes an unreasonable search and seizure of the Defendant's medical records.

Having determined that the search and seizure of the Defendant's medical records was unreasonable, the court must next determine what, if any remedy is appropriate.

In most instances involving unreasonable search and seizure suppression of the seized evidence is an appropriate remedy. However, there are exceptions to the exclusionary rule. One specific exception to that general rule is the inevitable discovery doctrine. According to the Utah Court of Appeals decision in State v. James, 977 P.2d 489 (Utah App. 1999), citing Nix v. Williams, 467 U.S. 431 (1984), the "'core rationale' behind the exclusionary rule is 'that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections.' . . . [H]owever . . . the deterrence rationale has no bite when 'the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.'" State v. James, at 492. While this case does not involve alleged police misconduct, a similar rationale would apply.

The Prosecutor would have been able to obtain the Defendant's medical records, or at least the records relating to the test of his blood for alcohol or controlled substances, as relevant evidence of the Defendant's physical condition at the time of the accident despite any claimed privilege, pursuant to Rule 506(d)(1) of the Utah Rules of Evidence, if the Prosecutor had provided the Defendant advance notice of the subpoena and otherwise complied with Rule 45. Since the Order Authorizing the Issuance of a Subpoena and Subpoena Duces Tecum, issued on June 23, 2005, satisfies the requirement for the issuance of a court order, as contemplated in Section 164.512(f)(1)(ii)(A) of Title 45 of the United States Code (HIPAA), there is no violation by the Prosecutor of that federal statute. The only harm in this instance is that the Prosecutor did not provide the Defendant notice before the Prosecutor obtained the Subpoena which he could and would have obtained even if notice had been given.

Therefore, the error was harmless and the "core rationale" behind the exclusionary rule does not apply.

To the extent that the Subpoena sought and obtained evidence relevant to the Defendant's physical condition at the time of the accident the Defendant's Motion to Suppress and Quash Subpoena for Medical Records is denied. Any information contained in the produced documents that is not relevant to the Defendant's physical condition at the time of the accident is ordered returned to the Defendant and references to such information is ordered redacted from those documents which the Prosecutor intends to use as evidence at trial.

DATED this 13th day of March, 2006.

BY THE COURT

G. MICHAEL WESTFALL
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that on the 13th day of March, 2006, a copy of the attached document was sent to the following people for case 051500105 by mail.

Leo G. Kanell
Deputy Beaver County Attorney
PO Box 471
Beaver, UT 84713

Edward K. Brass
175 East 400 South, Suite 400
Salt Lake City, Utah 84111

Deputy Court Clerk

ADDENDUM B

LEO G. KANELL
Deputy Beaver County Attorney
P.O. Box 471
Beaver, Utah 84713
Telephone: (435) 438-6441

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF BEAVER, STATE OF UTAH

STATE OF UTAH,	:	**AFFIDAVIT OF PROBABLE CAUSE**
Plaintiff,	:	
vs.	:	
NATHANIEL THOMAS YOUNT, DOB: 08/13/1981,	:	Criminal No. 051500
Defendant.	:	

STATE OF UTAH)
: ss.
County of Beaver)

TRAVYS STODDARD, being first duly sworn upon his oath, deposes and says:

1. That he is a Deputy with the Beaver County Sheriff's Department, and fully competent to testify concerning these matters.

2. That on June 22, 2005, I was dispatched to an accident up Beaver Canyon involving a vehicle rollover with injuries.

3. When I arrived at the scene of the accident I noticed a silver car had left the roadway and traveled down a steep ravine, coming to a rest against two trees approximately 75 to

100 feet down the hill. There were two individuals pinned underneath the vehicle; the Defendant, NATHANIEL THOMAS YOUNT, by his arm, and Roger Thomas by his leg. I immediately contacted dispatch and asked them to send search and rescue to assist in transporting the individuals up the hill.

4. When I approached the drivers side of the vehicle, I could smell the strong odor of alcohol coming from the driver, who I later learned was NATHANIEL THOMAS YOUNT. I also observed several open containers and full beer around and in the vehicle.

5. I then spoke with Tim Medler, the third individual who had been in the vehicle at the time of the accident. Tim Medler stated that they had each had two or three beers and that NATHANIEL THOMAS YOUNT had been driving at the time of the accident. Tim Medler also stated that they were traveling too fast, maybe 48 mph, when they went around the corner.

6. As I was helping the Emergency Medical Technicians transport NATHANIEL THOMAS YOUNT up the hill, I could still smell a strong odor of alcohol coming from the Defendant. The Technicians stated that they could also smell alcohol on the Defendant and on Roger Thomas.

7. As I conducted my investigation of the accident scene, I found three open beer containers and 13 unopened beer containers, which accounted for 16 of the 30 beers that were in the initial package that was found in the back of the vehicle. I also found a bottle of pills with three different kinds of pills on the ground by the vehicle.

8. That I asked Deputy Glen Woolsey of the Beaver County Sheriff's Office to go to the Beaver Valley Hospital to obtain a blood sample to determine how much alcohol was in the Defendant's system and if any other substances may have been involved in the accident.

9. That when Deputy Woolsey requested that NATHANIEL THOMAS YOUNT consent to a blood draw for purposes of the DUI investigation, NATHANIEL THOMAS YOUNT refused. Deputy Woolsey then read the refusal admonition to NATHANIEL THOMAS YOUNT, to which he responded, "I'm not going to let you take it without my lawyer present." Deputy Woolsey then read the second refusal admonition to NATHANIEL THOMAS YOUNT, and he still refused the draw.

10. Deputy Woolsey then advised NATHANIEL THOMAS YOUNT that he was currently on Court probation and required to consent to searches of himself, including tests of blood and body fluids. NATHANIEL THOMAS YOUNT was informed by Deputy Woolsey that his refusal to consent to a blood draw would also be a violation of his probation. NATHANIEL THOMAS YOUNT still refused the test.

11. A number of trees were broken during the rollover, and if two trees hadn't kept the vehicle from rolling further, Roger Thomas would have been crushed, Timothy Medler could have sustained serious injury or death, and NATHANIEL THOMAS YOUNT also could have been killed. Roger Thomas was taken to the Beaver Valley Hospital where it was discovered that his leg was severely damaged with multiple broken bones, and NATHANIEL THOMAS YOUNT received serious injuries to his arm and cracked ribs.

12. On June 22, 2005, at approximately 2200 hours, I was contacted by Monty Cartwright, a Forest Service employee who was working at the scene of the accident, and given a small baggie of marijuana that was found at the scene of the accident.

13. Affiant has information and a belief that the Beaver Valley Hospital has medical records and blood samples which contain crucial information necessary for the prosecution of this case.

Wherefore, based upon this Affidavit, Affiant requests that a Warrant be issued for the arrest of the Defendant, NATHANIEL THOMAS YOUNT, and an Order be issued authorizing the issuance of a subpoena to acquire the hospital records of NATHANIEL THOMAS YOUNT and any blood that was drawn pursuant to the accident on June 21, 2005.

DATED this 23 day of June, 2005.

TRAVYS STODDARD
Deputy, Beaver County Sheriff's Dept.

SUBSCRIBED AND SWORN to before me this 23 day of June, 2005.

WENDY L. HOLM
NOTARY PUBLIC • STATE of UTAH
2160 SOUTH 600 WEST
BEAVER, UTAH 84713
COMM. EXP. 11-06-2005

Notary Public

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BEAVER COUNTY
BY

FILED
FIFTH DISTRICT COURT
2005 JUN 24 PM 1:43
WASHINGTON COUNTY
BY

LEO G. KANELL
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Telephone: (435) 438-6441

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF BEAVER, STATE OF UTAH

STATE OF UTAH,	:	**ORDER AUTHORIZING THE ISSUANCE OF A SUBPOENA AND SUBPOENA DUCES TECUM**
Plaintiff,	:	
vs.	:	
NATHANIEL THOMAS YOUNT,	:	Case No. 051500 | D
Defendant.	:	

An Information having been duly authorized and presented for filing herein, and an affidavit, upon oath, having been made before me, and it appearing from the Information and affidavit that there is there are medical records and blood samples at the Beaver Valley Hospital which contain information crucial to the prosecution in this matter,

IT IS ORDERED that the State of Utah may prepare a Subpoena Duces Tecum to obtain the medical records of NATHANIEL THOMAS YOUNT and a Subpoena to obtain any blood samples that the Beaver Valley Hospital has in its possession pursuant to the Defendant's accident on June 21, 2005.

Dated this 23 day of June, 2005.

BY ORDER OF THE COURT.

G. Daryl Bowden
District Court Judge

LEO G. KANELL
Deputy Beaver County Attorney
2160 South 600 West
P. O. Box 471
Beaver, UT 84713
Telephone: (435) 438-6441

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF BEAVER, STATE OF UTAH

STATE OF UTAH,	:	**SUBPOENA**
Plaintiff,	:	
vs.	:	
	:	Criminal No. 051500105
NATHANIEL THOMAS YOUNT,	:	
Defendant.	:	

THE STATE OF UTAH TO: Beaver Valley Hospital
Laboratory
Beaver, Utah 84713

YOU ARE COMMANDED to immediately surrender any blood samples taken from the Defendant, NATHANIEL THOMAS YOUNT, on approximately June 22, 2005, for delivery to the State Crime Lab for analysis.

If you fail to obey this Subpoena, the Court may issue a Warrant for your arrest.

DATED this 24th day of June, 2005.

LEO G KANELL
Deputy Beaver County Attorney

State of Utah
Beaver County Sheriff's Office
Civil Division
Beaver, UT 84713

FILED
05-10
05 JUN 24 AM 10:40
BEAVER COUNTY

ess Number: 6822 Court Number: 051500105

enneth Yardley, Sheriff of Beaver County Sheriff's Office do hereby certify

I received the within and foregoing Subpoena Duces Tecum on 24th day of

, 2005, and that I served the same on:

BEAVER VALLEY HOSPITAL (Other)
1109 NORTH 100 WEST
Beaver, UT 84713
Served on: 24th day of June, 2005 at 10:45:21 by Woolsey, Glen
Served to: Les Gale (Laboratory Depart) Current Employr
1109 NORTH 100 WEST
Beaver, UT 84713

rned on the 24th day of June, 2005

so certify that I endorsed on the said copy the date of service, signed my

, and added my official title thereto.

d the 24th day of June, 2005

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Kenneth Yardley, Sheriff
Beaver County Sheriff's Office, Utah

BY: _____
Authorized Representative
Civil Division

ommission expires:

_____

_____
Notary Public

IENTS SERVED

)ena
· Authorizing The
ınce Of A Subpoena
Subpoena Duces Tecum

IN THE DISTRICT COURT OF THE FIFTH ~~JUDICIAL DISTRICT~~
BY

IN AND FOR THE COUNTY OF BEAVER, STATE OF UTAH

STATE OF UTAH,	:	**SUBPOENA DUCES TECUM**
Plaintiff,	:	
vs.	:	
NATHANIEL THOMAS YOUNT,	:	Criminal No. 051500105
Defendant.	:	

THE STATE OF UTAH TO: BEAVER VALLEY HOSPITAL
ATTN: MEDICAL RECORDS
PO BOX 1670
BEAVER, UT 84713
(435) 438-7166

YOU ARE COMMANDED in aid of a criminal action, pursuant to Section 77-22-2, Utah Code of Criminal Procedure, to provide for inspection and copying records of the Emergency Room and subsequent hospitalization records of NATHANIEL THOMAS YOUNT, a male, on July 15, 2005. NATHANIEL THOMAS YOUNT was seen at the Beaver Valley Hospital Emergency Room on approximately June 22, 2005 after a rollover automobile accident. The person designated to appear on behalf of the Beaver Valley Hospital need not appear if the documents and records are produced and sent to LEO G. KANELL, Deputy Beaver County Attorney, 2160 South 600 West, P. O. Box 471, Beaver, Utah 84713, Telephone No. (435) 438-6441, or Fax No. (435) 438-5348 prior to said date.

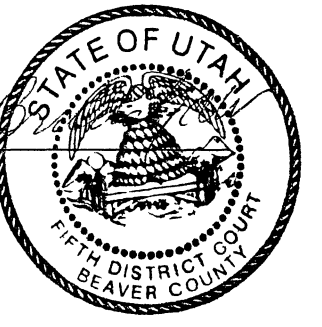
Disobedience of this subpoena may be punished as a contempt by the said court.

Dated this 13rd day of June, 2005.

CAROLYN BULLOCH

Clerk

By _____
Deputy Clerk



State of Utah
Beaver County Sheriff's Office
Civil Division
Beaver, UT 84713

FILED
FIFTH DISTRICT COURT
05-105
05 JUN 24 AM 10:40
BEAVER DOC.
BY

ɔcess Number: 6821 Court Number: 051500105

Kenneth Yardley, Sheriff of Beaver County Sheriff's Office do hereby certify
ıt I received the within and foregoing Subpoena Duces Tecum on 24th day of
ıe, 2005, and that I served the same on:

BEAVER VALLEY HOSPITAL (Other)
1109 NORTH 100 WEST
Beaver, UT 84713
Served on: 24th day of June, 2005 at 10:55:00 by Woolsey, Glen
Served to: Nancy Adams Records Clerk Current Employr
1109 NORTH 100 WEST
Beaver, UT 84713

urned on the 24th day of June, 2005

lso certify that I endorsed on the said copy the date of service, signed my
e, and added my official title thereto.

ed the 24th day of June, 2005

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Kenneth Yardley, Sheriff
Beaver County Sheriff's Office, Utah

BY: _____
Authorized Representative
Civil Division

ɔommission expires:

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Notary Public